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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970
No. 481

WILLIAM BUSH,
Petitioner,
vs.
ALLSTATE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX A
and
APPENDIX B

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APPENDIX A

Opinions Below

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28657

Summary Calendar

WILLIAM BUSH,

Plaintiff-Appellant,

versus

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(March 19, 1970)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: This Florida-based diversity action is predicated upon an insurance company's alleged bad faith in failing to settle a personal injury claim within the limits of an insured's automobile liability insurance

policy. A judgment in excess of the policy limits was returned in a Florida state court against the insured, and the insured brought this action for the portion of the judgment not satisfied by the insurance company. We affirm the judgment denying relief to the insured.[1]

William Bush, the appellant here, was sued in the Circuit Court of Broward County, Florida by Lummie McCord Grant for the injuries she sustained as a result of an automobile accident involving a vehicle owned by Bush. Allstate Insurance Company had issued a liability policy on this vehicle to Bush. This policy was limited to $10,000 payable for personal injury to one person. The insurer handled Bush's defense to the Grant claim. Shortly before trial of this claim was to begin, Grant's lawyer delivered a letter to the Allstate lawyers representing Bush. This letter read in part:

> "Please be advised that we hereby offer to settle this matter in full for $30,000 ... However, although it

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[1] We have concluded on the merits that this case is of the character that does not justify oral argument. Therefore, we have directed the Clerk to place the case on the Summary Calendar and to notify the parties of this action in writing, 5 Cir. R. 18; see Huth v. Southern Pacific Co., 5 Cir., 1969, 417 F.2d 526, 527-530; Murphy v. Houma Well Service, 5 Cir., 1969, 409 F.2d 804, 805-808.

would amount to a financial loss to out client, we would settle this litigation with you for your client's policy limits which we believe to be $20,000. This is a firm offer of settlement for $20,000 upon proper proof of the policy limits."

No settlement was made on the basis of this letter, and the trial was conduc ed, resulting in a judgment in favor of Grant for $24,000, plus interest and costs. The skeletal record presented to this Court gives almost no account of the events that occurred before the trial of the Grant-Bush lawsuit. The opinion on the District Court, however, relates the following:[2] Less than two months before the trial, Grant's lawyer, while stating that he felt Grant's claim had great potential and that Allstate's lawyers were "sitting on a powder keg," declined to give a settlement demand to the insurer's representatives. When pressed for a demand, he mentioned $20,000. Then, some two weeks before the trial was scheduled to begin, he offered to settle for in excess of $40,000. At the charge conference conducted by the state trial judge, he offered to settle for $18,500, but warned that he could not guarantee his client's acceptance of this amount. Grant apparently thought her claim was worth much more. When the jury's verdict of $24,000

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[2]Bush v. Allstate Insurance Company, S.D. Fla., 1969, 296 F.Supp. 368, 369.

was later announced, she screamed derisively at the jurors.

After Allstate paid Grant the policy limits in partial satisfaction of her judgment, Bush sued the insurer in the Broward County Circuit Court to recover the remainder of the judgment. The suit was removed to the Federal District Court by Allstate. There, after a trial to the court, a judgment in favor of Allstate was entered on February 24, 1969. On this appeal Bush contends that the District Court erred in denying him a jury trial and in refusing him recovery.

We first consider Bush's contention that he should have been afforded a jury trial in the court below. The facts material to this contention are as follows. Bush had not demanded a jury trial in the state court before this case was removed to federal court by Allstate in December 1966. During the next eighteen months, in which discovery was being conducted and Bush's present lawyer was substituted as counsel of record for his original counsel, no demand was made on Bush's behalf for a jury trial in the District Court. Then, on July 2, 1968, a pretrial conference was held. At this conference the lawyers for both sides and the District Judge labored under the assumption that this case was to be tried to a jury, notwithstanding that neither side had ever demanded a jury trial. Thereafter, on July 19, 1968, the clerk of the District Court set the case for a trial to the court to be held on September 16, 1968. In response to this

action, plaintiff's lawyer filed a motion on July 25, 1968, for a trial by jury. This motion read in part:

> "...(I)t is acknowledged that request for jury trial was inadvertently omitted in the state court proceedings by former counsel of record for (Bush). Thereafter it has been assumed by the parties that this cause was to be tried to a jury and that plaintiff's new counsel has always been under the inadvertent assumption that this cause was to be tried to a jury.
>
> "The pre-trial stipulation and conference provided that this cause would be tried to a jury ...
>
> "The first time that plaintiff's counsel was advised that this cause was not to be tried to a jury was the Honorable Court's notice of trial in this matter, said notice of trial being dated July 19, 1968..."

The District Judge denied the motion. For reasons that follow, we conclude that Bush waived his right to a jury trial and that the District Judge did not abuse his discretion in denying Bush relief from this waiver.

When this case was removed to the District Court, the Federal Rules of Civil Procedure became applicable. Fed. R. Civ. P. 81(c). Since Bush had not made an express demand for a jury trial in the Florida state court in accordance with

Fla. R. Civ. P. 1.430,[3] he was required to make such a demand in the District

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[3]Rule 1.430 of the Florida Rules corresponds to Fed. R. Cov. P. 38. It reads as follows:

"(a) Right Preserved. The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than ten days after the service of the last pleading directed to such issue. The demand may be indorsed upon a pleading of the party.

"(c) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise, he is deemed to demand trial by jury for all issues so triable. If he has demanded trial by jury for only some of the issues, any other party may serve a demand for trial by jury of any other or all of the issues triable by jury ten days after service of the demand or such lesser time as the court may order.

"(d) Waiver. The failure of a party to serve a demand as required by this rule shall constitute a waiver by him of trial by jury. If waived, a jury trial may not be granted without the consent of the parties. A demand for trial by jury made as herein provided

Court within the period prescribed by Fed. R. Civ. P. 81(c).[4] His failure to make a timely demand constituted a waiver of his right to a jury trial. Id.; cf.

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may not be withdrawn without the consent of the parties."

We intimate no opinion regarding whether Bush actually had a right to a jury trial under Florida law. However this question should be answered, his failure to make an express demand in the Florida court meant that a demand had to be made in the federal court. See note 4 infra.

[4]Rule 81(c) reads in pertinent part as follows:

"(The federal) rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal... If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on

Fed. R. Civ. P. 38(d).[5] Relief from that waiver was then to be found, if available at all, in an exercise of discretion by the District Court. Fed. R. Civ. P. 39(b).[6] We have recognized that "when the discretion of the court is evoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." Swofford v. B & B, Incorporated, 5 Cir., 1964, 336 F.2d 406, 409. It is not an abuse of discretion by a District Judge to deny a Rule 39(d) motion, however, when the failure to make a timely demand for a jury trial results from mere inadvertence on the part of the moving party. See, e.g., Noonan v. Cunard Steamship Co., 2 Cir. 1967, 375 F.2d 69; 5 Moore, Federal Practice, § 39.09,

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its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury."

[5]Rule 38(d) reads as follows:

"The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

[6]Rule 39(b) reads as follows:

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party

at 719 (2d ed. 1969). In this case the excuse put forth by Bush was the inadvertence of both his lawyers. That the pretrial conference was conducted under the mistaken assumption that Bush had complied with the federal rules respecting demand for a jury trial does not strengthen this excuse under the circumstances here. Accordingly, the District Court was not required to order a trial by jury.

We next consider the merits of Bush's claim against Allstate. Finding that this claim is fatally incomplete, we conclude, as did the District Court, that Allstate may not be held liable under Florida law for the excess over policy limits of Grant's judgment against Bush.

In Florida an insurer is liable for the excess over policy limits of a judgment against its insured if it fails to exercise good faith in the defense, handling, or settlement of the claim upon which that judgment is based. Liberty Mutual Insurance Co. v. Davis, 5 Cir., 1969, 412 F.2d 475, 480; Burton v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1964, 335 F.2d 317, 324 n. 14; Auto Mut. Indemnity Co. v. Shaw, 134 Fla. 815, 184 So. 852 (1938); American Fire & Casualty Company v. Davis, 146 So.2d 615 (Fla. Dist. Ct. App. 1962). When an insured

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to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

sues to recover such an excess on the ground that the insurer's conduct in failing to effect a settlement within policy limits amounts to bad faith, it must be shown that the insurer had an opportunity to settle the claim against the insured within policy limits. That is, in refusal-to-settle cases, Florida law does not subject the insurer to liability for bad faith or conduct tantamount to bad faith in the absence of an offer by the person claiming against the insured to settle within the limits of the insured's policy. American Fidelity Fire Insurance Co. v. Johnson, 177 So. 2d 679, 683 (Fla. 1966): accord, Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1968, 392 F.2d 723, 727-728. See also Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P. 2d 198 (1958). In this case the District Court found that Allstate never had an opportunity to settle within the $10,000 limit of Bush's policy. On the record before us, we have no basis for saying that this finding was wrong. Bush, therefore, was not entitled to recover from Allstate.

AFFIRMED.

United States Court of Appeals
Fifth Circuit
Office of the Clerk
May 4, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28657 - William E. Bush v.
Allstate Insurance Co.

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Pat Quastararo
Deputy Clerk

/paq

cc: Mr. Donald Feldman
Mr. Richard B. Adams

APPENDIX B

Rule 16 - Pre-Trial Procedure Excerpt from local rules of District Court of South Florida.

RULE 16 - PRETRIAL PROCEDURE

(Excerpt from local General Rules)

A. PRETRIAL CONFERENCE MANDATORY. Pretrial conference pursuant to Rule 16, Fed. R. Civ. P., shall be held in every civil action, unless the Court specifically orders that no pretrial conference be held. Each party shall be represented at the pretrial conference and at meetings held pursuant to paragraph B hereof by the attorney who will conduct the trial, except for good cause a party may be represented by another attorney provided he has complete information about the action or proceeding and is authorized to bind the party.

B. COUNSEL MUST MEET. No later than thirty days prior to the date of the pretrial conference, counsel shall meet at a mutually convenient time and place and:

1. Discuss settlement.

2. Prepare a pretrial stipulation in accordance with paragraph C of this rule.

3. Simplify the issues and stipulate to as many facts and issues as possible.

4. Examine all trial exhibits, except that impeachment exhibits need not be revealed.

5. Furnish opposing counsel names and addresses of trial witnesses, except that impeachment witnesses need not be revealed.

6. Exchange any additional information as may expedite the trial.

C. PRETRIAL STIPULATION MUST BE FILED.

It shall be the duty of counsel for the plaintiff to see that the pretrial stipulation is drawn, executed by counsel for all parties, and filed with the Court no later than ten days prior to pretrial conference. The pretrial stipulation shall contain the following statements in separate numbered paragraphs as indicated:

1. The nature of the action or proceeding.

2. The basis of federal jurisdiction.

3. The pleadings raising the issues.

4. A list of all undisposed of motions or other matters requiring action by the Court.

5. A concise statement of stipulated facts which will require no proof at trial, with reservations, if any.

6. A concise statement of facts which, though not admitted, are not to be contested at the trial.

7. A statement in reasonable detail of issues of fact which remain to be litigated at trial. By way of example, reasonable details of issues of fact would include: (a) As to negligence or contributory negligence, the specific acts or omissions relied upon; (b) As to damages, the precise nature and extent of damages claimed;

(c) As to unseaworthiness or unsafe condition of a vessel or its equipment, the material facts and circumstances relied upon; (d) As to breach of contract, the specific acts or ommissions relied upon.

8. A concise statement of issues of law on which there is agreement.

9. A concise statement of issues of law which remain for determination by the Court.

10. Each party's numbered list of trial exhibits, other than impeachment exhibits, with objections, if any to each exhibit, including the basis of objections.

11. Each party's numbered list of trial witnesses, with their addresses. Impeachment witnesses need not be listed. Expert witnesses shall be so designated.

12. Estimated trial time.

13. Where attorney's fees may be awarded to the prevailing party, an estimate of each party as to the maximum amount properly allowable.

D. UNILATERAL FILING OF PRETRIAL STIPULATION WHERE COUNSEL DO NOT AGREE.

If for any reason the pretrial stipulation is not executed by all counsel, each counsel shall file and serve separate proposed pretrial stipulations no later than seven days prior to the pretrial conference, with a statement of reasons no agreement was reached thereon.

E. RECORD OF PRETRIAL CONFERENCE IS PART OF TRIAL RECORD.

Upon the conclusion of the pretrial conference, the Court will enter further orders as may be appropriate. Thereafter the pretrial stipulation as so modified will control the course of the trial, and may be thereafter amended by the Court only to prevent manifest injustice. The record made upon the pretrial conference shall be deemed a part of the trial record. Provided, however, any statement made concerning possible compromise settlement of any claim shall not be a part of the trial record, unless consented to by all parties appearing.

F. DISCOVERY PROCEEDINGS. All discovery proceedings must be completed no later than fifteen days prior to the date of the pretrial conference, unless further time is allowed by order of the Court for good cause shown.

G. NEWLY DISCOVERED EVIDENCE OR WITNESSES. If new evidence or witnesses be discovered after the pretrial conference, the party desiring to use same shall immediately furnish complete details thereof and the reason for late discovery to the Court and to opposing counsel. Use thereof may be allowed by the Court in furtherance of the ends of justice.

H. MEMORANDA OF LAW. Counsel shall serve and file memoranda treating any unusual questions of law involved in the trial no later than ten days prior to the pretrial conference.

I. EXCHANGE REPORTS OF EXPERT WITNESSES. Where expert opinion evidence is to be offered at trial, a resume of oral or written reports of the experts shall be exchanged by the parties no later than twenty days prior to pretrial conference, with copies attached to the pretrial stipulation. Resumes must clearly disclose the expert opinion and its basis on all subjects on which the witness will be called upon to testify.

J. PROPOSED JURY INSTRUCTIONS. At the beginning of the trial, counsel shall submit proposed jury instructions to the Court, with copies to all other counsel. Additional instructions covering matters occurring at the trial which could not reasonably be anticipated, shall be submitted prior to the conclusion of the testimony.

K. PENALTY FOR FAILURE TO COMPLY. Failure to comply with the requirements of this rule will subject the party or counsel to appropriate penalties, including but not limited to dismissal of cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix A and Appendix B was mailed to Dean, Adams, George & Wood, attorneys for Respondent, Concord Building, Miami, Florida 33130, and that all parties required to be served have been served this 20 day of August, 1970.

Richard A. Sicking

Richard A. Sicking

DONALD FELDMAN

Donald Feldman

SUPREME COURT, U. S.

AUG 1 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term. 1970

No. 481

WILLIAM BUSH,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1970

No. _____

WILLIAM BUSH,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, WILLIAM BUSH, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying Petitioner's right to have a jury trial in a civil matter despite the pre-trial order issued pursuant to Rule 16 of the Federal Rules of civil procedure and local Rule 16(E) of the United States District Court for the Southern District

of Florida, which provided for trial by jury and for the manner and means of conducting the selection of the jurors. The Court of Appeals in sanctioning the lower court's abuse of Rule 16 has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

In addition, the Court of Appeals has affirmed the lower court's ruling to the effect that the sina qua non for a bad faith action by an insured against its insurer is an offer to settle the law suit for the precise limits of policy insurance.

Under Florida law, however, the limits of insurance are not discoverable by legal process. Florida law is to the effect that the insuror's bad faith need only be predicated upon an opportunity to settle within policy limits. By their ruling the Court of Appeals has decided an important state question in a way in conflict with the applicable state law so as to call for an exercise of this Court's power of supervision. The effect of the Court of Appeals' decision, if allowed to stand, would be that claimants in good faith, seeking to settle their claims, would have to correctly guess the amount of the insured's policy limits before the insurance companies could be liable for acting in bad faith. This situation would be an open door for insurance companies to sit back and gamble with their insured's money until and unless

their adversary might make a correct guess as to the precise limits of insurance. Such is not the law of Florida.

OPINIONS BELOW

The opinion of the District Court is reported at 296 F.Supp. 368 (S.D. Fla. 1969) (Appendix p. 39). The opinion in the U.S. Court of Appeals for the Fifth Circuit both on the original decision and on motion for rehearing is reported on their summary calendar No. 28657. (They are appended hereto as Appendix "A").

JURISDICTION

The order sought to be reviewed was made by the U.S. Court of Appeals for the Fifth Circuit on March 19, 1970. An order denying a timely motion for rehearing was made and entered on May 4, 1970. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1245(1).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER FAILURE OF THE DISTRICT COURT TO ALLOW TRIAL BY JURY WHERE THE UNMODIFIED PRE-TRIAL ORDER SO PROVIDES IS A VIOLATION OF RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND LOCAL RULE 16(E) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA?

2. WHETHER FAILURE OF THE DISTRICT COURT TO GRANT TRIAL BY JURY IN THE ABSENCE OF STRONG AND COMPELLING REASONS TO THE CONTRARY, AND WHERE ALL PARTIES TO THE ACTION HAVE PROCEEDED AND ACTED

UPON THE ASSUMPTION THAT THE CAUSE WAS TO BE TRIED BY A JURY IS AN ABUSE OF DISCRETION AND VIOLATIVE OF RULE 39(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

3. WHETHER THE DISTRICT COURT INCORRECTLY APPLIED THE STATE LAW WHICH PROVIDES THAT AN INSUROR'S BAD FAITH IN NOT SETTLING NEED ONLY BE PREDICATED UPON AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS BY HOLDING INSTEAD THAT THE INSUROR'S BAD FAITH IS PREDICATED UPON AN OFFER TO SETTLE WITHIN POLICY LIMITS.

Federal Rules of Civil Procedure Involved.

Rule 16 - Pre-trial Procedure; Formulating Issues.

". . . The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered . . . and such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustice . . . ."

Rule 16(E) of the United States District Court for the Southern District of Florida.

". . . Thereafter the pre-trial stipulation as so modified will control the course of the trial and may be thereafter amended by the court only to prevent manifest injustice." (Appended hereto as Appendix "B")

Rule 39 Trial by jury or by the court.

(B) Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion, may order a trial by a jury of any or all issues.

STATEMENT OF THE CASE

This action was brought in the United States District

Court by the defendant, Allstate Insurance Company, by virtue of a Section 1441 removal.

The lawsuit had its inception as the result of a state court action filed by the Petitioner herein against Allstate Insurance Company in the Florida State court. The gravamen of the complaint was that an adverse judgment had theretofore been entered against William Bush in a prior proceeding by one Lummie McCord Grant.

Grant had sued William Bush in the Florida State court for damages as the result of an automobile accident, involving a truck owned, but not driven, by Mr. Bush. Allstate carried the liability insurance on Bush's vehicle to the extent of $10,000.00. Allstate undertook Bush's defense and litigation terminated by a final judgment in favor of plaintiff and against Bush for the sum of $24,000.00 plus costs and interest. This judgment was entered on July 14, 1966, in the Circuit Court of Broward County, Florida, and was subsequently partially satisfied by Allstate in the amount of $10,000.00.

William Bush then sought to recover the excess of the partially satisfied judgment against him and sued Allstate for $14,000.00 plus costs, interest, and attorney's fees (App. 1 - 26). When this action was commenced in the circuit court, Bush's attorney did not ask for a trial by jury, nor did he do so after suit was removed to the United States District Court for the Southern District of Florida on or

about December 12, 1966.

Subsequently, on March 6, 1968, there was a substitution of counsel for plaintiff Bush, which said substitution was recognized by the lower court (App. 28, 29). Thereafter, a pre-trial stipulation was filed and, on July 2, 1968, a pre-trial conference was held, at which time the court directed, and the parties acquiesced, to a trial by jury and the manner and method of such trial (App. 50, 51, 75, 76).

Shortly thereafter, on July 19, 1968, the clerk of the district court set the cause for a civil nonjury trial to be held on September 16, 1968 (App. 36), whereupon plaintiff, on July 25, 1968, moved the court to schedule the cause for a trial by jury (App. 37).

No formal order on said motion was ever entered, though it is admitted that the court orally denied same.

The court, sitting without a jury, then tried the cause on September 19th and October 4th, 1968 (List of Docket Entries). The court issued its memorandum opinion on the 30th day of January, 1969, the tenor of which denied plaintiff's claim for relief (App. 39-43). No separate findings of fact or conclusions of law were made.

Judgment was entered on the 24th day of February, 1969, in favor of Allstate Insurance Company and against the plaintiff, William Bush (App. 33-34).

Thereafter, plaintiff filed his motion for new trial

on March 16, 1969 (App. 44-46), and a separate motion for findings of fact and conclusions of law (App. 46 - 49). The court entertained both of the aforesaid motions and hearing was held thereon on March 24, 1969 (App. 78 - 98).

By order dated April 8, 1969, both motions were denied. Plaintiff then issued a notice of appeal and petitioned both the lower court and the U.S. Court of Appeals for relief to proceed in forma pauperis. Said motions were denied (5th Circ., September 24, 1969, Misc. No. 1436).

Petitioner then appealed to the United States Court of Appeals for the Fifth Circuit raising the federal questions herein with respect to Rule 16, local rule 16(E) and Rule 39(B). In addition, the question involving the applicable state law to be applied to predicate an insuror's bad faith was raised. The Court of appeals on March 19, 1970 handed down its decision affirming the judgment of the lower court on all issues and expressly resolving all questions against the plaintiff. All issues were again raised in a timely petition for rehearing which was denied by an order entered by the Court of Appeals on May 4, 1970.

The testimony at trial has never been transcribed, but every effort will be made to present issues of law to this Honorable Court which appear upon the face of the record.

REASONS FOR GRANTING THE WRIT

POINT I

FAILURE OF THE DISTRICT COURT TO ALLOW TRIAL BY JURY WHERE THE UNMODIFIED PRE-TRIAL ORDER SO PROVIDED IS A VIOLATION OF RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 16(E) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

> "It is not an exaggeration to say that pre-trial procedure has been one of the greatest steps taken in recent years in the direction of reducing clogged dockets and shortening trials." Honorable Alexander Holzoff, Preface to the 1966 Federal Rules of Civil Procedure, page 15.

The procedure followed by the district court in the instant case of denying trial by jury pursuant to the unmodified pre-trial order, if allowed to stand, will greatly weaken and water down the full force and effect of Rule 16 of the Federal Rules of Civil Procedure which provides that:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." (Emphasis supplied)

In the instant case, the pre-trial order not only provided for trial by jury, but also for the manner and means of conducting the selection of jurors. The pre-trial transcript reflects the following:

> "THE COURT: Well this is a jury trial, of course, isn't it?

"MR. FELDMAN: Yes, sir, it is.

"THE COURT: Under the Florida statues, that has to be handled by the Court without a jury. (Attorney's fees).

"MR. FELDMAN: That is my understanding.

"THE COURT: My suggestion on that is that after the verdict, then we will arrange for it being done if there are to be fees awarded, depending upon the verdict. We will arrange for that to be done by affidavit unless counsel prefers to present direct testimony. I would suggest affidavit, but we can resolve that in a moment.

"Mr. Adams, do you have any feelings about the affidavit arrangement?

"MR. ADAMS: No, sir, it is fine with me. (App. 50-51)

* * * * *

"I will conduct a preliminary voir dire of the jury. Then I will turn the jury over, in a sense, to counsel to conduct their voir dire. All peremptory challenges available to the jurors in the box will be exercised as to those jurors at the time the jury is tendered. In other words, if the plaintiff excuses a juror and another one comes in, he will continue with his examination until he is ready to tender the jury. The same will be true of the defendant." (App. 75)

General Rule 16(E) of the United States District Court for Southern Florida provides that: "The record of pre-trial conference is part of trial record," and that, "the pre-trial stipulation as so modified will control the course of the trial, and may be thereafter amended by the Court only to prevent injustice."

"E. RECORD OF PRE-TRIAL CONFERENCE IS PART OF TRIAL RECORD.

"Upon the conclusion of the pre-trial conference,

> the Court will enter further orders as may be appropriate. Thereafter the pre-trial stipulation as so modified will control the course of the trial, and may be thereafter amended by the Court only to prevent manifest injustice. The record made upon the pre-trial conference shall be deemed a part of the trial record. Provided, however, any statement made concerning possible compromise settlement of any claim shall not be a part of the trial record, unless consented to by all parties appearing." (Rule 16(F), United States District Court, Southern District of Florida) (Emphasis supplied)

The custom in this district is to make the minutes of the pre-trial conference the pre-trial order. Please note the form used in this district as reflected by pages 76-77 of the Appendix to Brief for Appellant. In support of this procedure Professor Moore states:

> ". . . (2) The judge may dictate the order directly into the record at the conference or shortly thereafter. If, as is sometimes the practice, a record is made of the entire conference, the minutes may be adopted as the pre-trial order." (Moore, Federal Practice, Par. 16.18, p. 1130 (2d ed. 1969))

Thus the cause was to be governed by the pre-trial minutes and these clearly provided for trial by jury. If the cause was to thereafter be tried to the Court, rather than the jury, it was incumbent on the defendant to show unto the Court that manifest injustice would result unless the pre-trial minutes were to be modified.

The Court never modified the pre-trial order; the clerk issued the notice of non-jury trial.

The defendant never moved the Court to modify the pre-trial order.

The Court was never presented with any showing that manifest injustice would ensue if the pre-trial stipulation was adhered to and trial to the jury conducted.

The petitioner's right to a trial by jury pursuant to the pre-trial order should not be denied because he moved the Court to correct the clerk's error by having the cause transferred from the non-jury docket to the jury trial docket and at the same time asking for Rule 39(B) relief.

This Honorable Court in United States v. Houghan, 364 U.S. 310; 81 S.Ct. 13; 5 L.Ed. 2d 8; Reh. Den. 364 U.S. 938; 81 S.Ct. 376; 5 L.Ed. 2d 372 (1960), in determining the effect of a pre-trial order stated that (at 17):

> ". . . The effect of the order is clear from the language of Rule 16 which provides that the court after pre-trial conference, 'shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when ordered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.'"

See, Sinclair Refining Co. v. Howell, (5 C.A. 1955), 222 F.2d 637; Laird v. Aircarrier Engine Service, Inc., (5 C.A. 1959), 263 F.2d 948.

We submit that the words of Judge Murrah are most germane and must be followed to maintain the integrity and full force and effect of Rule 16:

> ". . . The pre-trial order supercedes the pleadings and becomes the governing pattern of the lawsuit." (Case v. Abrams, (10 C.A. 1965), 362 F.2d 193, 195.

Although squarely presented with Rule 16 error, the Court of Appeals below dealt with petitioner's right to trial by jury as a waiver problem and subsequent Rule 39(B) relief, rather than as a Rule 16 procedural question:

> "We first consider Bush's contention that he should have been afforded a jury trial in the court below. The facts material to this contention are as follows. Bush had not demanded a jury trial in the state court before this case was removed to federal court by Allstate in December 1966. During the next eighteen months, in which discovery was being conducted and Bush's present lawyer was substituted as counsel of record for his original counsel, no demand was made on Bush's behalf for a jury trial in the District Court. Then, on July 2, 1968, a pre-trial conference was held. At this conference the lawyers for both sides and the District Judge labored under the assumption that this case was to be tried to a jury, notwithstanding that neither side had ever demanded a jury trial. Thereafter, on July 19, 1968, the clerk of the District Court set the case for a trial to the court to be held on September 16, 1968. In response to this action, plaintiff's lawyer filed a motion on July 25, 1968, for a trial by jury. This motion read in part:
>
> > '. . . (I)t is acknowledged that request for jury trial was inadvertently omitted in the state court proceedings by former counsel of record for (Bush). Thereafter it has been assumed by the parties that this cause was to be tried to a jury and that plaintiff's new counsel has always been under the inadvertent assumption that this cause was to be tried to a jury.
> >
> > 'The pre-trial stipulation and conference provided that this cause would be tried to a jury . . .
> >
> > 'The first time that plaintiff's counsel was advised that this cause was not to be tried

to a jury was the Honorable Court's notice of trial in this matter, said notice of trial being dated July 19, 1968. . .'

"The District Judge denied the motion. For reasons that follow, we conclude that Bush waived his right to a jury trial and that the District Judge did not abuse his discretion in denying Bush relief from this waiver." (United States Court of Appeals for the Fifth Circuit - Decision dated March 19, 1970) (Emphasis supplied)

As the trial court never modified the pre-trial order, as it was never asked so to do and hence no compelling reasons for so doing presented, it was a clear and gross abuse of discretion not to have followed such order.

POINT II

FAILURE OF THE DISTRICT COURT TO GRANT TRIAL BY JURY IN THE ABSENCE OF STRONG AND COMPELLING REASONS TO THE CONTRARY, AND WHERE ALL PARTIES HAVE PROCEEDED AND ACTED UPON THE ASSUMPTION THAT THE CAUSE WAS TO BE TRIED BY A JURY IS AN ABUSE OF JUDICIAL DISCRETION AND VIOLATIVE OF RULE 39(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

If the petitioner has to rely upon Rule 39(B), rather than Rule 16, of the Federal Rules of Civil Procedure to establish his right to a trial by jury, he should have been granted same pursuant to said rule.

Basically, petitioner is being denied his basic right to jury trial because of his attorneys' inadvertence. Is this inadvertence any more cogent than that of the attorneys for the defendant or than that of the judge himself. All parties were equally inadvertent; all parties equally believed

that the case was one to be tried to the jury. Who would have been harmed if it were so tried? The words of the Fifth Circuit Court of Appeals in a prior decision would seem to have particular significance in the above context. "When the discretion of the court is invoked under Rule 39(B), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." Swofford v. B. & W. Incorporated, 5 Cir. 1964, 336 F.2d 406, 409.

"The federal policy favoring jury trials is of historic and continuing strength, Simler v. Conner, 372 U.S. 221, 222, 83 S. Ct. 609, 619, 9 L.Ed. 2d 691 (1963).

The court in AMF Tuboscope, Inc. v. Cunningham, (10 C.A. 1965), 352 F.2d 150 held that where both attorneys stipulated to trial by jury and the judge entered an order to that effect, it was an abuse of judicial discretion for the judge to later, on his own motion, deny the trial by jury.

When all parties have proceeded and acted upon the assumption that a cause be one for a jury, it would appear that there are no "strong and compelling" reasons for not granting such mode of trial.

POINT III

THE DISTRICT COURT AND THE COURT OF APPEALS INCORRECTLY APPLIED THE STATE LAW WHICH PROVIDES THAT AN INSUROR'S BAD FAITH IN NOT SETTLING IS PREDICATED UPON AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS BY HOLDING INSTEAD THAT THE INSURORS BAD FAITH NEED BE PREDICATED UPON AN OFFER TO SETTLE WITHIN POLICY LIMITS AND, MORE PARTICULARLY, FOR THE PRECISE AMOUNT OF SUCH LIMITS.

The Honorable Court of Appeals has herein stated:

> "When an insured sues to recover such an excess on the ground that the insurer's conduct in failing to effect a settlement within policy limits amounts to bad faith, it must be shown that the insurer had an opportunity to settle the claim against the insured within policy limits. That is, in refusal-to-settle cases, Florida law does not subject the insurer to liability for bad faith or conduct tantamount to bad faith in the absence of an offer by the person claiming against the insured to settle within the limits of the insured's policy. American Fidelity Fire Insurance Co. v. Johnson, 177 So.2d 679, 683 (Fla.Dist.Ct.App. 1963), cert. denied, 183 So.2d 835 (Fla.1966): accord, Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1968, 392 F.2d 723, 727-728. See also Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P. 2d 198 (1958)." (Emphasis supplied)

The Honorable Court of Appeals thus has equated "opportunity to settle within policy limits" with "an offer to settle within the limits of the insured's policy."

We respectfully submit that no Florida case has so held.

The Court's reliance upon Seward and Johnson is unfortunately misplaced. Neither of these two cases held that there had to be an offer to settle within the limits of the policy of insurance. They merely held that there had to be an offer of settlement.

The rationale of requiring an offer as a predicate to liability (Seward and Johnson) is that there be some showing of causation between the conduct complained of as constituting bad faith and the damages suffered.

". . . The only difference between American Fidelity and the instant case is the offer of settlement. Contrary to the appellant's contention, an uncommunicated offer is not the same as no offer. An offer to settle, even if unknown to the insurer, is objective evidence of the connection between the insurer's breach of contract and the amount of the damage.". (Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir. 1968, 392 F. 2d 723, at p. 727) (Emphasis supplied)

We submit that a very real difference is created by making "an offer to settle within the limits of a policy of insurance," the sine qua non of "an opportunity to settle."

The letter offering settlement, at issue herein, is set forth below:

"July 8, 1968

"Harry G. Hinckley, Esq.
Fischer & Hinckley
502 Court House Square Bldg.
Fort Lauderdale, Florida

Re: Lummie Grant vs. Bush & Downey

Dear Mr. Hinckley:

This letter is being written to you today and is being hand-delivered to you by me personally this date for the purposes of settling the above described matter which is set for Trial on July 11, 1966.

Please be advised that we hereby offer to settle this matter in full for $30,000.00. We believe this amount to be reasonable under all the circumstances and especially the fact that your examining physician has found Mrs. Grant totally disabled to date.

However, although it would amount to a financial loss to our client, we would settle this litigation with you for your clients policy limits, which we believe to be $20,000.00. This is a firm offer of settlement for $20,000.00 upon proper proof of the policy limits.

In reference to the actual Trial, please be advised of the following:

The address of Mrs. Stone is 1525 N. W. 5th Avenue, Pompano Beach, Florida.

Also, please be advised that although our Pre-trial Catalog referred to Mrs. Wilson as a witness, we intend to call Mr. Wilson, whose address is 1528 N. W. 5th Avenue, Pompano Beach, Florida.

Sincerely,

/s/ Ronald E. Kay
RONALD E. KAY
Attorney at Law

(Record, p. 107, Docket Entry 9, Deposition of Ronald E. Kay)

In the case at bar would the matter have been concluded if the defendant would have, in response to petitioner's ill-conceived demand letter, disclosed its true policy limits and offered the same in return for a full settlement? Could the insurer close its eyes to counsel's obvious misconception and never be held accountable?

The lower court's comment on rehearing is particularly germane as to the question of causal relationship between the failure to respond and the ultimate damage suffered:

"THE COURT: Well, isn't that true in any case? Isn't it true in most of your personal injury litigation cases, that if the defendant has no assets beyond his policy coverage, that the plaintiff would probably be willing to take the policy limits?

"MR. FELDMAN: Your Honor, I think that is universally recognized fact and that is why

> I say in this particular lawsuit, had the limits been disclosed, there would have been a settlement; certainly, there would be reasonable grounds to believe that there would have been a settlement, because anybody would accept that." (App. 87-88)

In addition, the Court held in Seward (supra) that:

> "The question before us is whether an insurer is liable to one of its insureds for damages in excess of the limits of the insured's automobile liability policy for having wrongfully refused to defend the insured in a suit that resulted in a judgment exceeding the amount of the policy. The insurer argues: No--not unless there is an offer of settlement the insurer might have accepted, or used as the basis for negotiation of a settlement, lower than the amount of the judgment." (Seward v. State Farm Mutual Automobile Insurance Co., supra, at p. 724) (Emphasis supplied)

Petitioner's motions for the lower court to make further findings of fact and conclusions of law point out how very real factual issues have been taken out of this case by the rule of law adopted by the lower court and herein followed by the Honorable Court of Appeals.

> "1. Once an offer to settle is made by a plaintiff, indicating an erroneous policy limit of defendant's insurance, is there a duty on the part of the insurer to inform the plaintiff of the actual limits of insurance and if the likelihood of a verdict in excess of such limit is indicated, to offer the amount of the policy in full satisfaction?
>
> 2. Did the attorney for Grant erroneously believe that the limits of Bush's Allstate policy were $20,000.00?" (App. 46-47)

* * * *

"5. Though Grant indicated a total dissatisfaction with the jury's verdict after trial, was her uncontradicted testimony that 'prior to trial' she had given her attorney permission to settle for the limits of Bush's insurance, but not to give any 'discounts', inherently incredible or impossible?

6. Did Grant's attorney conduct a financial investigation of Bush prior to trial and was he thereby aware that a judgment in excess of policy limits would be uncollectible?

7. Did Grant's attorney advise his client prior to trial to accept the limits of Bush's insurance, whatever they may have been?

8. Had the limits of Bush's policy been communicated to Grant's attorney, would he have recommended that she accept them and if so, would she have followed his advice?" (App. 47-48)

EVEN IF THE SINE QUA NON OF AN "OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS," IS AN OFFER TO SETTLE WITHIN SUCH LIMITS, THE RULING OF THE LOWER COURT WAS ERROREOUS BY PLACING AN EVEN GREATER BURDEN ON THE PLAINTIFF.

Faced with the inept written demand and oral testimony that Grant would have settled her litigation if Allstate would have disclosed Bush's policy limits, the court disposed of the entire matter by applying a rule of law more stringent than it had previously utilized. The lower court's opinion states:

"Bush further argues that Allstate had a duty upon receipt of the above discussed letter to respond by offering or at best disclosing the policy limits. Refusal to disclose policy limits in return for an offer to settle within coverage (upon such disclosure) does not render the insurer liable for an excess judgment. Chicoine v. State Farm Insurance Company, 223 N.E.2d 510 (Mass. Supreme Ct., 1967). (App. 42) (Emphasis supplied)

The court thus disposed of any factual issues dealing with the settlement negotiations by applying a rule of law to the effect that before the question of bad faith can be considered, there must have been an offer to settle for the specific amount of a policy of insurance.

If, under Florida law, limits of insurance were not discoverable (Brooks v. Owens, Fla. 1957; 97 So.2d 693), how much more decisive or definite could an offer to settle for policy limits be?

The incorrect application of the Florida law by the courts below results in the situation of allowing insurance companies to handle a case in bad faith with no fear of liability until the claimant guesses the limits of the insurance policy. Such a rule of law not only is not followed in Florida, but is violative of common sense and principles of justice, calling for an exercise of this Honorable Court's power of supervision.

CONCLUSION

This Court should grant certiorari and the judgment below should be reversed and the cause remanded for trial by jury.

Respectfully submitted,

RICHARD A. SICKING
Attorney for Petitioner
1951 N. W. 17th Avenue
Miami, Florida

RICHARD A. SICKING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition was mailed to Dean, Adams, George & Wood, Attorneys for Respondent, Concord Building, Miami, Florida 33130, and that all parties required to be served have been served, this 30th day of July, 1970.

RICHARD A. SICKING

Richard A. Sicking

DONALD FELDMAN

Donald Feldman

SUPREME COURT, U. S.

AUG 31 1970
ROBERT SEAVER, CLERK

In the Supreme Court of the United States

October Term, 1970

No. 481

WILLIAM BUSH,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court is reported at 296 F. Supp. 368 (S. D. Fla. 1969). The opinion of the Court of Appeals for the Fifth Circuit is reported at 425 F2d 393 (1970).

JURISDICTION

The Petition predicates jurisdiction on 28 USC Sec. 1245 (1), which citation appears to be a printers' transposition of 28 USC 1254 (1). Respondent respectfully submits that this case does not involve the peculiar gravity or general importance, nor present an adequate record, to justify exercise of this Court's power to review by certiorari.

STATEMENT

Respondent in this Brief will answer the questions presented for review by Petitioner as squarely and as briefly circumstances permit. It will be demonstrated that these questions as phrased by Petitioner are not accurate reflections of the issues raised in the Fifth Circuit Court of Appeals, and decided by that Court in its opinion.

Petitioner's statement of the case is generally fair and accurate. Respondent will accordingly limit this restatement to a few additional facts which are required to place the Petition in proper perspective.

The original complaint out of which this Petition arises alleged a cause of action against Respondent, Allstate Insurance Company, for a bad faith refusal to compromise or settle a claim within policy limits when it had an opportunity to do so. The District Court's PreTrial Order specified four particular issues of fact that allegedly constituted bad faith or a course of conduct amounting to bad faith. Failure to make offers of settlement, inadequate investigation, failure to keep the insured fully informed, and mismanagement of the defense are the specific elements of bad faith that were facts to be determined at trial. Petitioner has never contended that he was in any respect restricted by the trial court in the full presentation of his witnesses and evidence.

After a two day trial, involving extensive and conflicting testimony, the District Judge found as a fact that appellant, Allstate, did not have either an offer or an opportunity to settle the case within policy limits. *Bush v. Allstate Ins. Co.*, 296 F. Supp. at 370. Under Florida law, this finding was an outcome-controlling fact in an action of this type.

On appeal to the Fifth Circuit, Petitioner sought to challenge the adequacy of the District Court's findings. This challenge was

posed under the guise of a question of law because the record on appeal did not contain a transcript of the evidence and testimony upon which the judgment sought to be reviewed was based. Although the trial in the lower court lasted two full days numerous witnesses testified, and voluminious records were introduced, the Fifth Circuit was asked to review the lower Court's findings and conclusions in the absence of any record reflecting their basis. In other words, the Fifth Circuit was asked to declare the judgment of the District Court to be clearly erroneous without any knowledge of the testimony and evidence upon which that judgment was based.

REASONS THE WRIT SHOULD NOT BE GRANTED

POINT I

THE PRE-TRIAL ORDER DID NOT PROVIDE FOR A JURY TRIAL AT THE TIME OF TRIAL

This action was removed to the Federal District Court by Respondent on December 12, 1966. Notice of Removal was given Petitioner on this same date. In the state court, prior to removal, there had been no demand for a jury trial. Therefore, Rule 81(c) became applicable regarding trial by jury as of right, and required a demand within 10 days after service of the notice of removal. The last sentence of Rule 81(c) provides as follows:

> "The failure of a party to make a demand as directed constitutes a waiver by him of trial by jury".

Petitioner did not make a demand within the requisite 10 day period. Petitioner did not demand a jury within the 567 days between removal and the pretrial conference, or the 590 days between removal and his motion for jury trial. The waiver was an accomplished, legally operative fact at the time of the

pretrial conference on July 2, 1968. At this point, the parties themselves could not by mutual consent, even with full knowledge of the facts, remove or waive the consequences of the waiver of jury trial. If a jury trial has been waived, a motion is necessary to invoke the court's discretion since the court may not employ Rule 39(b) on its own initiative. *Swofford v. B&W Inc.*, 336 F2d 406, 409 (5th Cir. 1964).

The Petitioner, apparently recognizing the inability of the parties to destroy the waiver, and the need to activate the court's discretion, moved for a jury trial on July 25, 1968. This motion specifically refers to the pre-trial conference record, to the mistaken assumption on which all involved had proceeded, and requests the court to exercise its discretion to grant a jury trial under Rules 38 and 39. It is, therefore, completely unreasonable to argue that the pre-trial record in this cause was never modified, revised or amended to reflect that the trial would be non-jury. This was done in open court, all parties present, and squarely on the issue involved. This became a part of the Pre-Trial Record. At the hearing on motion for new trial, the trial judge stated:

> "THE COURT: When you received notice of trial it was a non-jury trial, and that is when you filed your motion.
>
> MR. FELDMAN: I agree. The problem is that under the Federal Rules the pretrial governs the subsequent court of the action.
>
> THE COURT: Well, that wasn't the final pretrial; that was the preliminary. The course of action would relate to matters concerning the exhibits and stipulations as to the facts and all those things. I don't see how the plaintiff could urge any prejudice because of that comment in terms of having waived something he already had."

Since the final pretrial record, at the time of trial obviously did not provide for a jury, Respondent had no reason or need to seek any formal amendment. However, the notice of civil non-jury trial issued by the Clerk on July 18, 1968 was also a part of the pretrial record. Although issued by the Clerk, this notice of trial was in fact and in legal effect the order of the district judge pursuant to Rule 40 of the Federal Rules of Civil Procedure.

Accordingly, it is an obvious, even an admitted, fact that the pretrial order did not provide for a jury trial at the time of trial. The record plainly shows a separate pretrial hearing on this issue, a careful exercise of judicial discretion by the trial judge, and no facts even suggesting an abuse of discretion. The ruling of the trial judge was strictly in accord with well-settled legal principles involving relief from waiver. See, 5 MOORE'S, Federal Practice, para. 39.09.

POINT II

IT IS NOT AN ABUSE OF JUDICIAL DISCRETION TO REFUSE TO GRANT RELIEF FROM WAIVER OF JURY TRIAL WHERE NO TIMELY DEMAND IS MADE, AND A JURY IS REQUESTED ON THE EVE OF TRIAL ON GROUNDS OF MERE INADVERTENCE.

The jury trial issue presented by Petitioner is brought into sharp perspective by the following facts which bear repeating:

Petitioner's original complaint was filed on November 15, 1966 in the Circuit Court for Broward County, Florida. It contains no demand for a jury trial.

The case was properly removed to the United States District Court for the Southern District of Florida on December 12,

1966. Petitioner thereafter made no demand for a jury trial under the provisions of Rule 81(c) pertaining to jury trial in removed actions.

Respondent's Answer was timely filed, but Petitioner thereafter failed to ask for a jury trial under Rule 38(g).

Approximately 15 months passed, during which period discovery was had and Petitioner's present attorney was substituted as counsel of record. Substituted counsel moved for and was granted a continuance of the pretrial conference in order to conduct necessary discovery and factually and legally prepare his case. No jury trial was sought during this period of approximately a year and a half. Petitioner's first and only demand for a jury trial came in the form of a motion after the case had been pending for 590 days, and after Petitioner's counsel had been granted a continuance to prepare his case.

Under these factual circumstances, the grant or denial of relief from the waiver of jury trial was within the trial court's discretion, and appellate courts normally refuse to interfere with this discretion as exercised. *Englbrock v. Federal Ins. Co.*, 370 F.2d 784 (5th Cir. 1967); *Tri-State Fire Service Co. v. Gates Rubber Co.*, 339 F.2d 573 (5th Cir. 1964); 5 Moore's Fed. Prac., para. 39.09 (p. 715). Petitioner frankly admits in his petition that no jury trial was requested by reason of inadvertence. This same ground was alleged in Petitioner's motion for a jury trial made shortly before the non-jury trial was set to commence. At this point, the last pleading directed to the triable issues had been filed of record for approximately 18 months, and the non-jury trial date had been assigned. Under these conditions the trial court did not abuse its discretion in refusing to grant Petitioner relief from his waiver.

It is settled today that the mere statement of "inadvertence" does not suffice to invoke the discretion of the court to grant relief from such a waiver. 5 Moore's *supra*, at p. 719; *Noonan v.*

Cunard Steamship Co., 375 F2d 69 (2d Cir. 1967). It can be reasonably inferred the trial court exercised its discretion to deny relief from the jury waiver because of the lateness of the demand, its grounding in mere inadvertence, the complexity of the issue, the prejudice to the defendant, and in the interest of expedient resolution of the cause. This ruling was consistent with the legal principle laid down by the Fifth Circuit in *Swofford V. B&W Inc.*, 336 F2d. 406 (5th Cir. 1964). In *Swofford* there was a demand for jury trial coupled with an amended complaint. In *Swofford* the Fifth Circuit acknowledged the broad discretion reposing in the trial judge and affirmed the exercise of discretion under the facts of that case. *Swofford* did not involve the "mere inadvertency" solely alleged by Petitioner herein.

The record in this case is devoid of any evidence even tending to suggest an abuse of discretion. Unlike *AMF Tuboscope, Inc. v. Cunningham*, 352 F2d 150 (10th Cir. 1965), the instant case was at all times on the non-jury trial docket, was never on the jury trial docket by joint stipulation of counsel or otherwise, and was never removed from the jury trial docket. Petitioner received the mode of trial which he elected.

POINT III

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY INTERPRETED FLORIDA LAW IN HOLDING AN INSURER NOT LIABLE IN EXCESS IN THE ABSENCE OF AN OPPORTUNITY TO SETTLE WITHIN POLICY LIMITS

In this case, contrary to Petitioner's claim, no court at no time has ruled that an insurers bad faith must be predicated on an offer of settlement for the precise amount of the policy

limits. The District Court and the Court of Appeals both held that an insurer could not be guilty of a bad faith refusal to settle in the absence of an *opportunity* to settle the claim within policy limits. (See Opinions below).

The District Judge reached this finding of no offer and opportunity to settle within policy limits in his capacity as trier of the factually conflicting evidence. A contrary finding may have rendered a different rule of Florida law applicable. However, Petitioner does not challenge the facts, nor did Petitioner provide a record on the basis of which The Fifth Circuit Court of Appeals could review the findings of fact. The appropriateness of the application of a particular rule of law cannot be argued until the facts are determined. Once the facts are fixed and have become unreviewable as in this case, the correct rule of law is easy to ascertain and apply.

Granting the facts as found, the correct rule of Florida law is well established in Florida state courts and in Florida cases decided in the Fifth Circuit. The controlling legal principal is clearly set out in *American Fidelity F & Ins. Co. v. Johnson*, 177 So2d 679 (1st D.C.A. Fla. 1965) at p. 681:

> "It is now settled in Florida that a liability insurance carrier which undertakes to defend and in bad faith refused to settle a claim within policy limits, will thereby subject itself to liability for any excess that may be recovered."

This Florida law has been repeatedly applied and affirmed in the Fifth Circuit Court of Appeal as evidenced by *Seward v. State Farm Mut. Auto Ins. Co.*, 392 F2d 723 (5th Cir. 1968) at p. 726:

> "However, in Florida, as in many states, it is well established that an insurer who undertakes to defend

but in bad faith refuses to settle a claim within the policy limits thereby subjects itself to liability for any excess over the policy limits that may be recovered. Dotschay v. National Mutual Ins. Co., 5 Cir. 1957, 246 F. 2d 221, 222; American Fidelity & Casualty Co. v. Greyhound Corp., 5 Cir. 1956, 232 F.2d 89, 93; Tully v. Travelers Ins. Co. N.D. Fla 1954, 118 F. Supp. 568, 569; American Fidelity Firs Ins. Co. v. Johnson, supra at 681; American Fire & Casualty Co. of Greenville v Davis, Fla. App. 1962, 146 So2d 615, 167; Canal Ins. Co. of Greenville v. Sturgis, Fla. App. 1959, 114 So.2d 469; 115 So. 2d 774, Fla. 1960, 122 So.2d 313; Auto Mutual Indemnity Co. v. Shaw, 1938, 134 Fla. 815, 184 So. 852, 859."

In the absence of both an offer and an opportunity to settle within policy limits, it is obvious that Respondent could not be guilty of a bad faith refusal to settle within policy limits, and that the District Court and the Court of Appeal applied the correct rule of Florida law.

CONCLUSION

As the decisions below are clearly correct, and involve no conflict of decisions, or substantial question of federal law, Respondent respectfully submits that this petition for writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

No. 481

WILLIAM BUSH,

Petitioner,

vs.

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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FEDERAL RULES OF CIVIL PROCEDURE

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT

Respondent's brief has come before this Honorable Court and has, we are afraid, confused rather than clarified the issues.

Frequent references are made to the

lack of a transcript of evidence and testimony; and that Petitioner under the guise of a question of law sought to have the Court of Appeals declare the District Court's judgment clearly erroneous. (Respondent's brief p. 3).

Petitioner has twice filed motions to proceed in forma pauperis which were denied by the District Court and the Court of Appeals. Lacking the funds for a transcript, Petitioner has only raised and sought to have reviewed questions of law. It is respectfully submitted that said issues can be decided with the present record. It is to factual issues that the "clearly erroneous" doctrine applies and thus, Petitioner has not nor does he now seek to show that the decision of the lower court was clearly erroneous, but rather that it was wrong as a matter of law.

ARGUMENT

THERE WAS ONLY ONE PRETRIAL CONFERENCE RESULTING IN ONE PRETRIAL ORDER PURSUANT TO RULE 16 AND THE COURT ERRED IN NOT FOLLOWING ITS OWN PRE-TRIAL ORDER.

Respondent in Point One has expended much effort to try and establish more than one pretrial conference and more than one pretrial order. The record does not support this contention nor does the list of docket entries.

Mar. 14	Order for pretrial conference Mon., 5/27/68 at 4:00 P.M. Judge Atkins.
June 14	Amended Order granting Motion for Continuance and setting Pre-Trial Conference (1) Pre-Trial Conference is set for July 2, 1968 at 4:30 P.M., and Pre-Trial Stipulation entered into by parties must be filed June 24, 1968.(c/13/68/CCA)
June 24	Pre-Trial Stipulation, filed by Plaintiff & Defendant.
July 19	CIVIL NON JURY TRIAL. Sept. 16, 1968 10:00 CA
Sept.19	TRIAL BY THE COURT WITHOUT A JURY-Proceedings on trial.
Oct. 4	Non-jury trial resumed and concluded. Special Findings-of-fact and Conclusion of Law to enter(CCA) (Docket entries attached hereto as Appendix C)

The Respondent attempts to make everything that happened between the formal pretrial conference (the minutes of which are recorded) and the trial itself as "Pretrial". Certainly, they are that as a matter of chronological event, but just as certainly not Rule 16 pretrial proceedings.

The record is clear and directly to the effect that the pretrial conference occurred on July 2, 1968 at 4:30 P.M. The minutes thereof have been transcribed and constitute a part of the record. (Please see Appendix C attached hereto).

Unfortunately, the Honorable Court of Appeals did not take into consideration the pretrial order and its effect on the proceedings, and Respondent must sincerely wish that this Honorable Court also deal solely with Rule 39(b) and not with Rule 16.

It is significant to note that Respondent does not discuss anywhere in his brief

Rule 16 of the Federal Rules of Civil Procedure as evidenced by his table of authorities.

Surely, if, as the record reflects, there was only one pretrial conference and hence one pretrial order, the lower court fell into error when that pretrial was not followed and jury trial not afforded.

When the Clerk of the District Court set the cause for a civil nonjury trial, Petitioner moved for jury trial pursuant to Rule 39(b). It should be noted that no formal order on said motion was ever entered and the list of docket entries so reflects an absence of such order.

Petitioner does candidly admit to this Honorable Court that the lower court orally denied said motion. Petitioner respectfully submits, however, that denial of said motion was immaterial as a result

of the following statement of issue:

Should plaintiff's rights pursuant to the pretrial order be given less effect because he moved the Court to correct the Clerk's error and at the same time asked for Rule 39(b) relief?

AN "OFFER" TO SETTLE WITHIN POLICY LIMITS IS NOT THE SINE QUA NON OF AN "OPPORTUNITY" TO SETTLE WITHIN POLICY LIMITS.

Respondent argues that there was a finding by the trial court that there was both no "opportunity" to settle within policy limits and no "offer" to so do. This is true, but in so holding both the trial court and the Court of Appeals equated the two terms, that is "opportunity: and "offer." It is in this legal ruling that error was committed and the factual issues bearing on "opportunity" were never ruled upon.

In these regards the Honorable District Court held:

"Bush further argues that Allstate had a duty upon receipt of the above discussed letter to respond by offering or at best disclosing the policy limits. Refusal to disclose policy limits in return for an offer to settle within coverage (upon such disclosure) does not render the insurer liable for an excess judgment. Chicoine v. State Farm Insurance Company, 223 N. E. 2d 510 (Mass. Supreme Ct., 1967)." (App. 42) (Emphasis supplied)

In like manner the Honorable United States Court of Appeals held:

"When an insured sues to recover such an excess on the ground that the insurer's conduct in failing to effect a settlement within policy limits amounts to bad faith, it must be shown that the insurer had an opportunity to settle the claim against the insured, within policy limits. That is, in refusal-to-settle cases, Florida law does not subject the insurer to liability for bad faith or conduct tantamount to bad faith in the absence of an offer by the person claiming against the insured to settle within the limits of the insured's policy. American Fidelity Fire Insurance Co. v. Johnson, 177 So.2d 679, 683 (Fla. Dist. Ct. App. 1965), cert. denied, 183 So.

2d 833 (Fla. 1966): accord, Seward v. State Farm Mutual Automobile Insurance Co., 5 Cir., 1968, 392 F. 2d 723, 727-728. See also Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P. 2d 198 (1958)." (Emphasis supplied)

CONCLUSION

It is respectfully requested that this Honorable Court adopt the Rule of Florida Law so ably set out by Respondent, to-wit: "An Insurer could not be guilty of a bad faith refusal to settle in the absence of an opportunity to settle the claim within policy limits," (Respondent's brief p. 3) but which the District Court and the Court of Appeals misconstrued by requiring that the offer must be made within policy limits.

In its present posture the law of Florida would allow an insurance carrier to gamble its insured's money with impunity unless plaintiff's counsel were

astute enough to phrase a demand, which was for an amount within the limits of insurance. It is the party who has no control of the litigation, the insured, who suffers as the result of an unjust law making him responsible for his adversary's mistakes and his insurance company's callousness to his interests by "gambling" the outcome of trial.

Respectfully submitted,

By Richard A. Sicking
Richard A. Sicking

By Donald Feldman
Donald Feldman

APPENDIX C

Docket Entries

1968

Mar. 6 Stip. & Order allowing withdrawal of Fleming, O'Bryan & Fleming and substituting Donald Feldman as counsel for Pltf.

Mar. 14 Order for pre trial conference Mon., 5/27/68 at 4:00 PM, Judge Atkins.

Apr. 19 Motion for Production of Documents, etc., filed by Plaintiff.

Apr. 19 Motion for Continuance, filed by Plaintiff.

Apr. 19 Notice of hearing on 5/13/68 at 2:00 P. M.

May 8 Notice of taking deposition of Eugene Fisher, Esq.

May 17 Order on Motion to Produce is hereby granted. (5/13/68/CCA)

17 Order on Motion for Continuance is hereby granted, and Pre-Trial Conference is set for June 10, 1968 at 11:00 A.M. (5/13/68/CCA)

29 Deposition of H. Eugene Fischer.

June 14 Amended Order granting Motion for Continuance and setting Pre-Trial Conference: (1) Pre-Trial Conference is set for July 2, 1968, at 4:30 P.M., and Pre-Trial Stipulation entered into by parties must be filed June 24, 1968. (c/13/68/CCA)

June 24 Memorandum Re The Question of Negligent Preparation and other Negligent Aspects of Defense in Establishing The General Issue of Presence or Absence of Good Faith, filed by Plaintiff.

June 24 Pre-Trial Stipulation, filed by Plaintiff & Defendant.

June 20 Re-notice of taking deposition of JAMES W. McCARTY, on 6/20/68 at 10:30 A.M.

July 5 Notice of filing excerpts of Testimony in lawsuit of LUMMIE McCORD

GRANT VS WILLIAM E. BUSH in Circuit Court of Seventeenth Judicial Circuit of Florida, Case No. L65-896, filed by Plaintiff.

July 5 Excerpts of Testimony taken on 7/11/66, and Excerpts of testimony taken 7/12/66.

9 Motion for Summary Judgment, filed by Defendant, ALLSTATE INSURANCE CO.

9 Notice of hearing on 7/18/68 at 11:30 A.M., before Judge Atkins.

12 Re-Notice of Hearing. September 9, 1968 2:00 CA

15 Re-Notice of Hearing. September 9, 1968 10:00 Motion for Summary Judgment

19 CIVIL NON JURY TRIAL. Sept. 16, 1968 10:00 CA

25 Motion for Setting of Cause of Trial By Jury, Pursuant to Federal Rules of Civil Procedure 38 and 39.

25 Notice of Hearing. Sept. 9, 1968 2:00 CA

Sept.12 Deposition of JAMES W. McCARTY

Sept.6 Memorandum of Law in opposition to Motion for Jury Trial, filed by Deft. ALLSTATE INSURANCE CO.

19 TRIAL BY THE COURT WITHOUT A JURY - Proceedings on trial.

20 NON-JURY TRIAL RESUMED - Continued until Sept. 26,. 1968 or sooner.

Oct. 4 Non-jury trial resumed and concluded. Special Findings-of-Fact and Conclusions of Law to enter. (CCA)

- - - - - - -

1969

Oct. 16 Notice of Points to be raised on Appeal, filed by Plaintiff.

Oct. 16 Notice to Court Reporter for preparation of parts of record on appeal.

22 Transcript of hearing at pretrial conference on 7/2/69

22 Transcript of hearing on Motion for New Trial on 3/24/69

22 Directions to the Clerk to retain record on appeal in District Ct. in accordance with Rule 11, and to submit copy of docket entries in lieu of appellate papers, filed by attorneys for appellant.

23 Certificate of the readiness of record on appeal.

CLERK'S CERTIFICATE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief was mailed to Dean, Adams, George & Wood, attorneys for Respondent, Concord Building, Miami, Florida 33130, and that all parties required to be served have been served this 21 day of September, 1970.

Richard A. Sicking

Richard A. Sicking

Donald Feldman

Donald Feldman